No. 83-2004

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
*Petitioners*

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

---

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE and BRIEF OF THE GOVERNMENTS OF AUSTRALIA, CANADA, FRANCE, and THE UNITED KINGDOM OF GREAT BRITAIN and NORTHERN IRELAND AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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June 15, 1985

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## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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Under Rule 36.3 of the Rules of this Court, the Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland respectfully move for leave to file the attached brief as amici curiae in support of petitioners' position on the foreign sovereign compulsion and act of state defenses. Petitioners have consented to the filing of this brief; respondents have not.

This case presents to this Court for the first time questions relating to the treatment by U.S. courts of the official statements made directly to them by friendly foreign sovereigns, and the relationship between such statements and the defenses of foreign sovereign compulsion and act of state. The decision of the Court of Appeals below refusing to give conclusive effect to, or even to acknowledge, the official statement of the Japanese Gov-

ernment is of great concern to friendly foreign sovereigns, including the Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland.

To the knowledge of the moving Governments, the attached brief represents the first time an amicus curiae brief has been presented to this Court by more than one foreign government. Through the attached brief, these Governments wish to ensure that this Court is fully apprised of their views on the issues before this Court relating to the foreign sovereign compulsion and act of state defenses. They respectfully submit that, in a case presenting the question of the proper treatment to be accorded the official statements of foreign sovereigns by U.S. courts, it would be very unfortunate if these Governments were deprived of the opportunity to present their views directly to this Court.

For this reason, and to enhance relations between the United States and its major trading partners, the Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland respectfully request that the Court accept and consider the attached brief.

Respectfully submitted,

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## QUESTION PRESENTED

The Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland will address the following three-part question upon which this Court granted certiorari:

> May a U.S. court (a) disregard the duly issued statement of a friendly foreign government attesting that certain export controls observed by its nationals were compelled by that government, (b) permit the trier of fact to adjudicate the veracity of such an official government statement, or (c) hold such government-mandated conduct to constitute or be a feature of a conspiracy in violation of the U.S. antitrust laws.

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## BRIEF OF THE GOVERNMENTS OF AUSTRALIA, CANADA, FRANCE, and THE UNITED KINGDOM OF GREAT BRITAIN and NORTHERN IRELAND AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland submit this brief as amici curiae.

### INTEREST OF THE AMICI CURIAE

The amici were not involved in the case at bar[1] and take no position on this controversy other than to support petitioners' position on the foreign sovereign com-

[1] Amici did advise the Department of State of their serious concern about the Court of Appeals' treatment of the act of state and foreign sovereign compulsion issues. The Solicitor General lodged copies of amici's statements with the Clerk of the Court in connection with the filing of the petition for a writ of certiorari.

pulsion and act of state defenses. Moreover, the refusal of the Court of Appeals below to give dispositive weight to, or even to acknowledge, the official statement of the Japanese Government is of great concern to amici because it is inconsistent with the fundamental international legal principle of mutual respect for the sovereignty of friendly foreign governments within their own territory. The interest of the amici in these matters is described in detail below.

Amici are among those governments most friendly to the United States. Each considers the United States to be one of its most important trading partners. For many years, each has conducted friendly economic relations with the United States via a carefully fashioned network of multilateral and bilateral agreements, formal and informal arrangements, active participation with the U.S. Government in international organizations, and ad hoc consultations with the Executive Branch.

Trade and investment between the United States and the amici are traditionally and necessarily conducted on the basis of mutual respect for each nation's sovereignty. Principles of international law and comity govern these relationships. One of the fundamental attributes of each nation's sovereignty is the right to control conduct within its borders in the manner it deems appropriate, subject only to such limitations as may be agreed between governments or otherwise required by international law. To the extent that different national policies give rise to international concern or dispute, bilateral or multilateral diplomatic mechanisms, rather than unilateral adjudication, are the appropriate means of seeking resolution. This strongly held position of the amici and other nations on sovereignty has led to difficulty with regard to the application of the antitrust laws of the United States.[2] High level intergovernmental consulta-

[2] For an acknowledgement of these difficulties, *see* Sec. of State George P. Shultz, *Trade, Interdependence and Conflicts of Jurisdiction*, Address before the S. Car. Bar Ass'n in Columbia (May 5, 1984), *reprinted in* Dept. of State Bulletin, June 1984, at 33. *See also Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws* (J. Griffin ed. 1979).



tions have, from time to time, been held and multilateral understandings have been reached on how conflicting national interests may be reconciled.[3] The Governments of Australia[4] and Canada[5] have entered into bilateral notification, consultation, and cooperation arrangements with the U.S. Government concerning issues arising under the U.S. antitrust laws.

The need for mutual accommodation and comity among co-equal sovereigns has been judicially acknowledged in the U.S. legal doctrines of foreign sovereign compulsion and act of state. In a number of situations, the U.S. Government has advised the amici that the doctrine of foreign sovereign compulsion would constitute a defense

[3] On May 18, 1984, Ministers comprising the Council of the Organization for Economic Cooperation and Development, including the U.S. Secretary of State, agreed to strengthen bilateral and multilateral cooperation in intergovernmental conflicts involving multinational enterprises by strongly encouraging governments to follow an approach of cooperation, moderation and restraint, rather than unilateral action. *See* Organization for Economic Cooperation and Development, *International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decisions* 26 (1984); *see also* Organization for Economic Cooperation and Development, *Recommendation of the Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade*, OECD Doc. C (1979) 154 (1979).

[4] Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters (June 29, 1982), *reprinted in* [1969-83 Current Comment Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,440.

[5] Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws (Mar. 9, 1984), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,464.

to liability arising from an antitrust lawsuit in the United States based on conduct affecting U.S. commerce that was mandated by a foreign government. In reliance on such assurances, some of the amici have acceded to requests by the U.S. Government for the imposition of government mandated export restraints on their manufacturers. For example, earlier this year the U.S. Government requested that Australia limit the quantity of certain steel exports to the United States. Pursuant to the Agreement Between the Government of the United States and the Government of Australia Relating to Cooperation on Antitrust Matters, the Australian Government requested the U.S. Government's views on antitrust questions regarding the Australian Government's steel export control system. In response, the then Assistant Attorney General for the Antitrust Division advised the Australian Government, *inter alia*, that

> We also believe that a court would view Australian steel exporters' compliance with the mandatory export limits established by the Australian Government as having been compelled by your government, acting within its sovereign powers and in conjunction with the United States Government under the Trade and Tariff Act of 1984, and consequently as not giving rise to a violation of United States antitrust laws.

Letter from Ass't Att'y Gen. McGrath to Charge d'Affaires, Embassy of Australia, at 3 (January 18, 1985).

In situations other than export restraints, some amici have considered entering into agreements or understandings with the U.S. Government intended to regulate aspects of their bilateral economic relations. In such deliberations, amici have relied upon their understanding of relevant international legal principles and the decisions of this Court and lower U.S. courts relating to the defenses of foreign sovereign compulsion and act of state. The fundamental basis on which relations between the amici and the United States are conducted would be removed if these defenses could not be invoked by private parties that rely upon such intergovernmental understandings in their subsequent conduct. Indeed, U.S. laws purporting to impose liability on conduct mandated by friendly foreign sovereigns would themselves constitute a serious invasion of the sovereignty and prerogatives of such sovereigns.



In addition to the shared interest of the U.S. Government and the amici in the viability and scope of the foreign sovereign compulsion and act of state defenses, amici also have a compelling interest in the treatment that is accorded their official statements made to U.S. courts. In 1978, the Department of State, at the suggestion of the Clerk of this Court,[6] encouraged foreign governments to present their views directly to U.S. courts.[7] Since then, friendly foreign governments have relied on the State Department's position and have presented their views directly to the relevant U.S. court, as did the Japanese Government below. In this case and others, the filing of a statement by a friendly foreign sovereign in a U.S. court has failed to prove satisfactory. For example, the Seventh Circuit's treatment of friendly foreign government amicus briefs in the *Uranium*[8] case

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[6] Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *printed in* 1978 Dept. of State *Digest of United States Practice in International Law* 561, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979).

[7] Dept. of State, Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *printed in* 1978 Dept. of State *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979). *See also* Letter from Deputy Legal Adviser Marks (June 15, 1979), *described in* 73 Am. J. Int'l L. 669, 678-79 (1979).

[8] The court described the foreign governments as "surrogates" for non-appearing defendants and added "shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction." *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1256 (7th Cir. 1980).

prompted the Legal Adviser of the State Department to request the Justice Department to inform the court that the court's "language has caused serious embarrassment to the United States in its relations with some of our closest allies." [9] In the instant case, the Court of Appeals below did not acknowledge, let alone give conclusive effect to, the directly relevant filing by the Government of Japan.

## ARGUMENT

### I. A U.S. COURT MAY NOT DISREGARD THE STATEMENT OF A FRIENDLY FOREIGN GOVERNMENT THAT IT MANDATED PRIVATE CONDUCT.

The related doctrines of foreign sovereign compulsion and act of state are judicial acknowledgements of the fundamental principle of international law that a sovereign's exercise of its authority within its territory is not reviewable by the courts of another nation.[10] In 1962, this Court indicated that conduct compelled by a foreign sovereign does not give rise to U.S. antitrust liability. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (the defense was not available in that case because there was "no indication that [any] official within the . . . Canadian Government approved or would have approved of" the challenged conduct). This Court and lower U.S. courts have offered several well reasoned explanations for the existence and importance of the foreign sovereign compulsion doctrine, including: international comity, judicial noninterference

[9] Letter from Legal Adviser Owen to Assistant Attorney General Shenefield (Mar. 17, 1980). For background and a substantial text of the letter, *see* 74 Am. J. Int'l L. 657, 665-67 (1980).

[10] "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations . . . . The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, *prima facie* exclusive, over a territory . . .; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states . . . ." I. Brownlie, *Principles of Public International Law* 287 (3d ed. 1979).



in the Executive Branch's conduct of international relations, fairness to private parties caught between conflicting sovereign commands, the construction of the Sherman Act,[11] and the concept that conduct compelled by a foreign sovereign should be deemed an act of the sovereign itself.[12] Amici urge this Court to reaffirm the foreign sovereign compulsion doctrine's vitality.

The most reliable evidence of a foreign sovereign's policy, law, method of operation and intention *vis-a-vis* particular challenged conduct is a statement by that sovereign. This Court has relied on statements from subordinate state governments within the domestic legal environment of the United States.[13] In an international context the equality of nations demands that at least the same weight should be given to the statement of a co-equal, friendly foreign sovereign describing its regulatory actions and their significance within its own cultural and legal environment, which often will be unfamiliar to U.S. courts.

As noted above, since 1978 the U.S. Government has encouraged foreign governments to address U.S. courts directly. If this Court now holds that such filings prop-

[11] "Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce." *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

[12] *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 606 (9th Cir. 1976).

[13] In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721, 1730 (1985), this Court was faced with the task of determining whether, in the absence of a Mississippi statute expressly permitting the challenged conduct, the state had clearly articulated a policy to displace competition with a regulatory structure. The Court relied on the State of Mississippi's Amicus Curiae Brief in the District Court to hold that the state commission had actively encouraged collective ratemaking.

erly may be disregarded by U.S. courts, the Executive Branch will have the very difficult task of convincing foreign sovereigns that there is any acceptable mechanism in the U.S. legal system for friendly foreign sovereigns to express the nature and effect of their regulatory actions within their territory. It clearly would not be acceptable to such sovereigns that they be required to submit the determination of such questions of fact to the courts of another sovereign.

Amici therefore urge this Court to hold that official statements made to U.S. courts by friendly foreign governments that they mandated private conduct may not be disregarded.

## II. THE TRIER OF FACT MAY NOT ADJUDICATE THE VERACITY OF AN OFFICIAL STATEMENT BY A FRIENDLY FOREIGN SOVEREIGN THAT IT MANDATED PRIVATE CONDUCT.

In 1897, this Court formulated what it later described as the "classic American statement" [14] of the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

*Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

The act of state doctrine apparently was first applied by this Court in a suit under U.S. antitrust law in 1909, when it held, citing *Underhill*, that the doctrine barred adjudication of a claim that the defendant persuaded the Costa Rican Government to expropriate a competitor's

[14] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964).



plantation. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-58 (1909).

In analyzing the act of state doctrine in a recent antitrust case, the Ninth Circuit made the following perceptive comments in illuminating the underpinnings of that doctrine:

> The doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.

*International Association of Machinists v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

Amici submit that the preceding explanation of the bases of the act of state doctrine, as well as *United States v. Pink*, 315 U.S. 203, 218-21 (1942), and its progeny, explain why U.S. courts may not adjudicate the veracity of an official statement by a friendly foreign

government that it mandated private conduct. Such an adjudication of a friendly foreign sovereign's official statement would be an unacceptable intrusion into the sovereignty of that friendly foreign government. It could, as a practical matter, render the act of state and foreign sovereign compulsion doctrines meaningless and would, at minimum, create uncertainty in international economic relations. Amici believe that the U.S. Government would have the same reaction to such adjudications of its statements by foreign courts.

Another sound policy reason for U.S. courts not to inquire into the veracity of such a statement by a friendly foreign sovereign is that such an inquiry will necessarily involve the difficult task of appraising the manner in which a foreign political and legal system operates. In each case where the question of foreign sovereign compulsion arises, the determinative inquiry for a U.S. court is whether the foreign sovereign exercised its authority to mandate the relevant conduct. The fact that a foreign sovereign may express itself in a manner other than by explicit, compulsory orders may reflect a different style of governance, not a less intense involvement in the issue. Friendly foreign governments should not have their national policies questioned or thwarted by American courts because they do not adopt compulsory formal orders.[15] Inflexibility by U.S. courts in requiring explicit formal orders would discriminate improperly in favor of governments with centrally planned and highly regulated economies and would elevate the form of the foreign sovereign's involvement over the substance of that involvement.

[15] It also should be noted that Section 2-615(a) of the Uniform Commercial Code provides in part that "compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid" excuses non-performance. This section has been held to excuse non-performance based on an *informal* U.S. Government procurement program. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F. 2d 957, 996 (5th Cir. 1976).



Within the context of the U.S. federal system, this Court has recognized that private anticompetitive conduct encouraged, but not compelled, by state governments may be entitled to antitrust immunity.[16] In this case, the Government of Japan has expressly stated that it mandated the challenged private conduct. Amici respectfully submit that in an international context it would be inappropriate for this Court to fail to accord co-equal foreign sovereigns the freedom in choosing regulatory alternatives or in expressing their national policies that it has accorded states in the U.S. federal system.

Amici strongly urge the Court to adopt the Executive Branch's suggestion that statements by friendly foreign governments that they mandated private conduct within their territory be given "dispositive weight." Brief for the United States as Amicus Curiae in Support of the Petition for Certiorari at 17.

## III. CONDUCT MANDATED BY A FOREIGN SOVEREIGN MAY NOT CONSTITUTE OR BE A FEATURE OF CONSPIRACY UNDER U.S. ANTITRUST LAW.

As discussed above, the foreign sovereign compulsion and act of state doctrines require a U.S. court to consider and give conclusive effect to the statement of a friendly foreign sovereign that it mandated private conduct. It would be illogical to reach such a result, but then to hold that such conduct may nevertheless constitute or be a feature of conspiracy under U.S. antitrust law. Such a holding could lead to the very exacerbation of interna-

[16] The Court recently held that, in the state action immunity context, a private party acting pursuant to an anticompetitive state regulatory program need not "point to a specific, detailed legislative authorization" of its challenged conduct but may rely on an express intent to displace competition in a particular field with a regulatory structure. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. at 1730-31 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)).

tional conflict that the foreign sovereign compulsion and act of state doctrines are designed to avoid.

Attempts by U.S. courts to hold that conduct mandated by a foreign sovereign constituted a feature of conspiracy under U.S. antitrust law would, in many instances, be resisted by foreign governments as a matter of national sovereignty. This could lead to further foreign governmental measures to counteract what many nations view as assertions of U.S. jurisdiction that are inconsistent with international law.[17] In this case, the Executive Branch has clearly recognized the dangers of such developments. *Id.* at 16-20.

## IV. ISSUES IMPINGING ON THE SOVEREIGNTY OF FOREIGN GOVERNMENTS SHOULD BE DECIDED AT AS EARLY A STAGE AS POSSIBLE.

Finally, it is submitted that issues in U.S. legal proceedings that impinge on the sovereignty of other nations should be decided as early in the proceedings as possible.[18] One of the underlying rationales of the act of state and foreign sovereign compulsion doctrines is that, whatever the eventual outcome of the litigation, an inquiry into the actions of a foreign government will disrupt harmonious international economic relations. Moreover, U.S.-style discovery conducted beyond U.S. territory can only exacerbate conflict in such a situation, and is clearly inappropriate where the official statement of a friendly foreign government can resolve the matter conclusively.

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[17] *See, e.g.*, A. V. Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (1983); Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 Am. J. Int'l L. 783 (1984); Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 Stan. J. Int'l L. 247 (1982).

[18] For a recommendation of swift action, *see* 2 J. R. Atwood & K. Brewster, *Antitrust and American Business Abroad* 348 (2d ed. 1981).



## CONCLUSION

Amici urge the Court to reaffirm the vitality of the foreign sovereign compulsion and act of state doctrines by holding that U.S. courts may neither disregard nor adjudicate the veracity of a statement by a friendly foreign sovereign that it mandated private conduct, and to hold that such conduct may not constitute or be a feature of conspiracy under U.S. antitrust law.

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